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In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-131.

ANTHONY C. MASCOLO AND
UNITED AMERICA THEATRE CORPORATION
D/B/A PUSSYCAT CINEMA,
PETITIONERS,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

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Brief of the Respondent in Opposition.

Respondent is not dissatisfied with petitioners' citation of the opinion below, their statement of jurisdiction or their statement of the case.

Questions Presented.

1. Whether review by this Court of the claimed error in the trial court's instruction on scienter is appropriate where there is no conflict between the decisions of this Court and of the Massachusetts Supreme Judicial Court on the requirement of scienter in an obscenity case.

2. Whether, since the trial *de novo* system has been abolished in Massachusetts, the individual petitioner's claim that the exercise of his First Amendment rights was chilled by the *de novo* system raises a substantial federal question.

3. Whether the trial court's refusal to convene a state-wide venire was a proper exercise of its discretion.

Argument.

I. Review by this Court of the Claimed Error in the Trial Court's Instruction on Scienter is Inappropriate Since there is No Conflict Between the Decisions of this Court and of the Massachusetts Supreme Judicial Court on the Requirement of Scienter in an Obscenity Case.

The petitioners assert that the trial court improperly instructed the jury that it could bring in a guilty verdict in this obscenity case if it found that the petitioners either knew of the contents of the film or were aware of the nature and character of the material (petitioners' brief, p. 8). While the trial court did conclude its remarks with this comment, a review of the entire charge reveals that the jury was adequately instructed. See *Hamling* v. *United States*, 418 U.S. 87, 107-108 (1974). (See also Appendix A, *infra*.)

Indeed, in affirming the petitioners' convictions the Massachusetts Appeals Court held that the charge taken in its entirety was adequate.

> The defendants' several objections to the judge's instructions to the jury in defining the knowledge which must be shown for a conviction . . . strike us as being largely superficial. *Commonwealth* v. *Mascolo*, ____ Mass. App. Ct. ____, Mass. App. Ct. Adv. Sh. (1978) 435, 448.

Thus, the trial court's isolated misstatement does not constitute error which presents a substantial federal question. See *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973).

Assuming, as the petitioners assert, that the Massachusetts Appeals Court improperly affirmed the trial court's instructions, any error in the Appeals Court's decision is indeed an isolated one and does not represent a departure from Massachusetts law. Prior to the Appeals Court's decision in this case, the Massachusetts Supreme Judicial Court ruled that a defendant must be shown to have knowledge of the contents of the allegedly obscene material as well as knowledge of its general character in order to be found guilty. *Commonwealth* v. *707 Main Corp.*, ____ Mass. ____, Mass. Adv. Sh. (1976) 2643, 2653:

> [The Massachusetts obscenity statute] does not dispense, however, with the constitutional requirement that a defendant have knowledge of the matter's contents and general character before a criminal conviction for its dissemination may be obtained.

This Court has similarly held that the federal Constitution minimally requires a demonstration of knowledge of the contents as well as of the character of the allegedly obscene material. *Hamling* v. *United States*, *supra*, 418 U.S. at 123.

Thus, even assuming error in the Appeals Court's decision, review by this Court is inappropriate. The decisions of the Supreme Judicial Court on this issue are not in conflict with this Court's rulings. To grant a petition for certiorari in this case would, therefore, be a meaningless exercise, for this Court's ultimate decision would have application only to these facts.[1]

II. SINCE THE TRIAL DE NOVO SYSTEM HAS BEEN ABOLISHED IN MASSACHUSETTS, THE INDIVIDUAL PETITIONER'S CLAIM THAT HIS EXERCISE OF HIS FIRST AMENDMENT RIGHTS WAS CHILLED BY THE DE NOVO SYSTEM FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

In yet another assault on the trial *de novo* system, the individual petitioner asserts constitutional error in the imposition of a jail sentence after his *de novo* appeal where he had only been fined by the District Court. Conceding that this Court's decision in *Colten* v. *Kentucky*, 407 U.S. 104, 116 (1972), bars a claim that *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), applies to his case, he asserts that the First Amendment is offended by the imposition of a one-year sentence after his jury trial in the Superior Court (petitioners' brief, pp. 9-

[1]The petitioners also complain of the trial court's use of an analogy to demonstrate community standards. While the analogy might have been inappropriate, or even misleading, it cannot be said that it so infected the entire trial, for the trial court adequately instructed the jury on its responsibility to determine community standards. See *Cupp* v. *Naughten*, *supra*, 414 U.S. at 147. (See also Appendix B, *infra*.)

11). Notwithstanding the merits, or lack thereof, of the petitioner's argument, the recent abolition of the *de novo* system by the Massachusetts Legislature substantially eliminates any reason for this Court's granting review in this case, for there is little, if any, possibility that this issue will arise in the future.

Pursuant to § 158 of c. 478 of the Acts of 1978 (adding § 268A to M.G.L. c. 218), trial of all criminal offenses within the jurisdiction of the District Courts of the Commonwealth "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury." Thus, all defendants now have a right to a jury trial in the first instance which they must affirmatively waive if they desire a bench trial. While there is no constitutional right to a jury trial in an obscenity case, a defendant who fears a bench trial, for whatever reason, can have his jury trial initially in the District Court.[2]

The situation complained of by the petitioner would, therefore, only arise again if a jury trial were not initially available. Since it now is, future defendants in obscenity prosecutions could not complain that a bench trial in the first instance chilled the exercise of their First Amendment rights, for it would be they who affirmatively avoided the initial jury trial. Thus, the petitioner's claim poses no substantial question appropriate for review by this Court.

III. THE TRIAL COURT'S REFUSAL TO CONVENE A STATE-WIDE VENIRE WAS A PROPER EXERCISE OF ITS DISCRETION.

The petitioners finally claim that the trial court was constitutionally obligated to convene a venire from the entire

[2]The Sixth Amendment right to a jury trial is conditioned upon the seriousness of the offense, not the nature of the offense. *Baldwin* v. *New York*, 399 U.S. 66, 73 (1970). Thus, if the maximum potential sentence for violation of this Massachusetts obscenity statute were less than six months the constitutional right to a jury trial would not obtain. *Id.*

Commonwealth since a county venire is, per se, unable to apply relevant community standards in determining whether the petitioners' film was obscene (petitioners' brief, pp. 12-13). This claim also is not worthy of review by this Court.

While the Supreme Judicial Court has held in *Commonwealth* v. *Trainor*, ____ Mass. ____, Mass. Adv. Sh. (1978) 899, 901, that the trier of fact ". . . must use an average citizen of Massachusetts as the standard for determining whether particular matter appeals to the prurient interest of the average person and for determining whether the matter depicts or describes sexual conduct in a patently offensive way," the petitioners point to no evidence which even suggests that a jury drawn from Suffolk County is incapable of applying such a standard. In affirming the petitioners' convictions, the Appeals Court found this lack of evidentiary support fatal to their claim.

> . . . there is no showing on the record before us that a jury drawn from a statewide venire would be more likely to perceive and to apply the contemporary standards of the Commonwealth as measured by the views of an average citizen than would a jury drawn from a single county. *Commonwealth* v. *Mascolo*, *supra*, Mass. Adv. Sh. (1978) at 439-440.

Thus the petitioners' failure to demonstrate any prejudice voids their claim. Cf. *Peters* v. *Kiff*, 407 U.S. 493, 504 (1972).

The petitioners speculate, nevertheless, that a juror drawn from the Boston area, concededly the largest metropolitan center in Massachusetts, is not representative of community views toward obscenity (petitioners' brief, p. 13). The Constitution, however, mandates that a jury be drawn from a fair

cross-section of the community, not an actual one. See *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Moreover, it is as easily arguable that a metropolitan venire, more exposed to diverse views and mores, would more readily find a matter not to be obscene. This Court, however, should not predicate its decisions upon such conjecture.

Conclusion.

For the above-stated reasons the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts should be denied.

Respectfully submitted,

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Appendix A.

Excerpt from Charge to Jury.

Now this a jury is not only permitted to do, that is, draw inferences, but humanity and human affairs being what they are, it is required to draw inferences. For example, as I look out the window — I don't know if you can see out a window — I see a blue sky and I see brightly lighted texture of the building outside, from which I infer that the sun is shining. I cannot see the sun, and yet I infer from what I have just described, those facts, that the sun indeed is shining and I am satisfied of that beyond a reasonable doubt.

And in cases of this kind you are not faced with facts as pleasant as the fact that the sun is shining; but from your experience, given certain facts, from your experience and your mental processes it reasonably follows from a fact that you have observed and that you are satisfied exists or is true beyond a reasonable doubt, you may draw therefrom reasonable inferences leading you to conclude that if these certain facts that you have satisfied yourself are so beyond a reasonable doubt, then it reasonably follows that the next fact exists or did exist and was a fact. This you are not only entitled to do, but in order to make sense out of our affairs, this you must do. All right.

Now I must turn again to what must be becoming your favorite statute and mine and I am going to turn to some parts of it that you and I have not previously discussed. The section that you and I dealt with the other day was the one that involved definitions, and I only dealt with you with one definition. The section under which the defendants are charged is section 29 of the same statute, and this is not too difficult, as I read it, but I will probably make some other remarks. Whoever disseminates — shows or exhibits — any matter which is

obscene, knowing it to be obscene, or whoever has in his possession any matter which is obscene, knowing it to be obscene, with the intent to disseminate shall be punished.

Now like all statutes, that raises as many problems in its rather simple wording as it solves. Notice those phrases, knowing it to be obscene. What does this mean? Well, fortunately for you and me, our Supreme Judicial Court has dealt with this question — or, rather, the statute itself has dealt with the question, because in the section, parts of which you and I have been over before, that contains definitions they define knowing for the purposes of this statute. Knowing means a general awareness of the character of the matter. A general awareness.

In short, though that section 29 says knowing it to be obscene, the court says that the defendant doesn't need to know that the matter is obscene as a matter of law but, rather, must know the general character of the film. That's what knowing it to be obscene means.

Now I see some expressions of doubt, and let me see if I can clarify that. A general awareness of the character of the matter is sufficient for a person to be found to have knowledge that the matter was obscene under this statute. Furthermore, our court has said the prosecution need not show that a defendant knew the matter to be legally obscene in order to sustain the prosecution's burden of proof. Furthermore, the prosecution need not prove by direct evidence that the defendant had knowledge of all of the material's contents. The prosecution must produce evidence, however, from which a jury could conclude beyond a reasonable doubt that the defendant had seen or should have seen or otherwise had knowledge of the material's contents or, as the statute said, a general awareness of the character of the contents of the film.

Now here is probably a good enough time for me to deal with first the corporation and then Mr. Mascolo. You must decide — and this is why I talked to you about inferences — you must decide whether or not the film was ordered without any knowledge of its general character, whether or not the film was advertised without a knowledge of its general character, whether or not it was in fact shown from the projection room without a general knowledge or without knowledge of its general character. If you find that this enterprise, United American Theatre, was a commercial undertaking, then you must consider the problem of whether or not such an undertaking, whatever it was, would purchase, advertise and show a film without having a knowledge of its general character.

In short, here, as in so many cases, you cannot, not being mindreaders, explore the interior of a person's brain, but you are able, whichever way you go, to conclude from the activities, if you find that such existed or were performed, whether or not as the statute says, there was a general awareness of the character of the film on the part of Mr. Mascolo.

* * * * * * * * *

Appendix B.

Excerpt from Charge to Jury.

Prurient interest we have been over several times. I gave you a quote from an opinion when I was talking to you on the stand that the film had to taken as a whole — dominant theme went substantially beyond customary limits of frankness in appealing to a shameful or morbid interest in sex. The dictionary definition has language that also indicates that it must appeal to lustful instincts as it is being shown and, of course, that would follow that you would imagine that the word prurient included — and it does — an appeal to lustful instincts but that its dominant theme must be one which goes substantially beyond customary limits of frankness in appealing to a shameful or morbid interest in sex. This you remember from our interviews.

You will also recall that since that part of the statute referred to the prurient interest of the average person, that that is the standard you must use, not your own, you may remember, but rather the average person's views as you understand them to be in your own community. That's what the statute and the court in its definition says.

Sexual conduct in a patently offensive way. Again, you must use the average citizen. Whether or not what was shown would be patently offensive, both what was shown and the fact that it was shown on film, must be patently offensive to the average person applying standards of the Commonwealth.

And, finally, the film lacked serious literary, artistic, political or scientific value.

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